

FORM TO BE USED BY A FEDERAL PRISONER IN FILING A PETITION FOR WRIT
OF HABEAS CORPUS PURSUANT TO 28 U.S.C. SECTION 2241

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-HC-2062
(leave this space blank)

FILED

APR 16 2010

DENNIS P. IAVARONE, CLERK
US DISTRICT COURT, EDNC
BY _____ DEP CLK

Robert Wayne Fiscus
(enter full name of petitioner)

v.

Inmate Number 07826-081

Tracy Johns, Warden

(enter full name of respondent)

1. Place of detention FCI Butner, Butner, NC

2. Name and location of court which imposed sentence U.S. District Court, Salt Lake City, Utah

3. List the indictment number(s) (if known) upon which sentence was imposed and the offense(s) for which sentence was imposed. Grade A Violation Of Supervised Release.

4. Give the date upon which sentence was imposed and the terms of the sentence JAN. 4, 2007, 12 months in prison, No Supervised release to follow.

5. Check whether a finding of guilty was made

- ☒ After a plea of guilty
- ☐ After a plea of not guilty
- ☐ After a plea of nolo contendere

6. If you were found guilty after a plea of not guilty, check whether that finding was made by ☐ a jury

☐ a judge without a jury

7. Did you appeal from the judgment of conviction or the imposition of the sentence?

☐ yes

☒ no

8. If you answered "yes" to #7, list:

(a) the name of each court to which you appealed:

- (1) N/A
- (2) _____
- (3) _____

(b) the result in each court to which you appealed, and the date of each such result:

- (1) N/A
- (2) _____
- (3) _____

(c) if known, the citations of any written opinion(s) or order(s) entered pursuant to such results:

- (1) N/A
- (2) _____
- (3) _____

9. State concisely the **grounds** on which you base your allegations that you are being held in custody unlawfully. Due Process rights under the 5th and 14th amendments has been violated, Right to be Protected against Unlawful Search and Seizure under the 4th Amendment have been violated, Right to a Speedy trial and Effective assistance of Counsel under the 6th amendment has been violated, Rights under the ex post facto Clause have been violated, right to be Protected Against double Jeopardy have been violated, BOP lacks the authority to apply the Walsh act to Purely State Conduct.

10. State concisely and in the same order the **facts** which support each of the grounds set out in #9. Please See attached

A. Mr. Fiscus' Due Process rights under the 5th and 14 amendment have been Violated.

1. Mr. Fiscus is being detained by the BOP after his mandatory ~~release~~ release date long ago expired. He is being detained because the BOP Certified him as a "Sexually dangerous Person", 18 USC 4248. However, No Federal Judge has ever Signed an order authorizing Mr. Fiscus to be held past his release date. The only Judicial Order Placing Mr. Fiscus in BOP Custody expired ON 11-16-2007, A long time ago. The BOP Unilaterally decided that Mr. Fiscus Should Not be released. No Judicial Officer has Signed or issued any order authorizing the Continued detention of Mr. Fiscus.

2. Mr. Fiscus has been held for more than 29 Months past his release date. He has been given NO detention or Probable Cause hearing to determine if his Continued detention is Warranted. He has Seen NO Judge at all in the 29 months he has been held past his release date. NO Judge has authorized Mr. Fiscus to be held for 29 Months past his release date. This is indefinite, unchecked detention, Subject to NO Judicial Review. This is also A gross Violation of due Process.

3. In Kansas v. Hendricks the Supreme Court Narrowly upheld a State law allowing Civil Commitment of Sexual Predators. In doing so they outlined that one of the main reasons the Kansas law was upheld was because of the many Procedural Protections the Kansas law required. These Protections included timely notice of Certification, a Probable Cause hearing, and A Civil Commitment trial. The Kansas law required the Custodian of an individual Suspected to be a Sexual Predator to Notify the Prosecuting attorney 60 days Prior to the Persons release. IF the Prosecutor decides to ~~state~~ Pursue Civil Commitment he must file A Petition Seeking Commitment within 45 days of getting Notification From the Prison. Then the State must ~~also~~ hold a trial within 45 days after the Filing of the Prosecutors Petition. Mr. Fiscus was Certified mere days before his release, has been given NO hearing or trial, and has been held in Custody for almost 3 years past his release date. Mr. Fiscus' Continued unchecked detention does not Conform to the Supreme Courts Precedent in Kansas V. Hendricks

because the Court upheld the Kansas law based in large part on its many Procedural Protections. Mr. Fiscus has been given NONE of these Protections.

4. The district Court under Judge Britt struck down 18 USC 4248 as Unconstitutional before Mr. Fiscus was ever Certified. Because this law had been ruled Unconstitutional by the district Court the BOP had No authority to Certify Mr. Fiscus and detain him here at Butner. Holding Mr. Fiscus under a law that has been Struck down is Not only A Violation of due Process, its illegal.

B. Mr. Fiscus' right against Unlawful Search and Seizure under the 4th amendment has been Violated.

1. Civil Commitment is a Seizure for Purposes of the 4th amendment. The district Court Struck down 4248 as Unconstitutional before Mr. Fiscus was detained. Therefore, the BOP had No authority to detain Mr. Fiscus under 4248 at Butner. Because the BOP chose to ignore the ruling of the district Court Mr. Fiscus' detention under 4248 is AN illegal Seizure.

2. Since Civil Commitment is a Seizure it may only be made with a Showing of Probable Cause. Mr. Fiscus has now been detained under 4248, past his release date for 29 months. He has yet to be given a Probable Cause hearing.

C. Mr. Fiscus has been denied ~~a~~ his right to a Speedy trial under the 6th amendment, and effective assistance of Counsel

1. The BOP has now detained Mr. Fiscus under 4248 for 29 months. He has had absolutely No judicial review or hearing of any kind. By Certifying him the BOP has "Sentenced" Mr. Fiscus to indefinite and unchecked detention that has lasted for years. Not only is Mr. Fiscus being denied a Speedy trial he is being denied any trial at all. He is being Provided No Opportunity to face the Charges against him (that he is Sexually dangerous), Prove that he is Not and

go home. Not only does the Constitution require Mr. Fiscus get a hearing the Statute itself requires it! Yet for 29 months he has gotten no hearing of any kind.

2. After being Certified Mr. Fiscus was appointed Counsel through the Federal Public Defenders Office. However, Mr. Fiscus may as well have NO Counsel at all. In the 29 months since his release date his attorney has done nothing to advance the case of Mr. Fiscus. She has filed no motions, pushed for no hearings, or done anything else to advance Mr. Fiscus' case. The Public Defenders Office also refuses to file motions under 28 USC 2241 to address the continued violation of their clients rights, or motions to change venue for those who want it since 4248 has been upheld in the 8th and 1st Circuits. The entire approach of the Public Defenders Office has been to do nothing for any of their clients other than the 5 in the Comstock v. U.S. Case. There advise to the additional 95 men detained under 4248 since it was struck down by Judge Brist in Comstock, including Mr. Fiscus, has been to not make waves and hope for the best in the Supreme Court. This is ineffective and negligent. If the BOP is going to be allowed to ignore the ruling of the district court and now the 4th Circuit then people detained under 4248 at Butner should be allowed to exercise their right to a hearing if they want it. Mr. Fiscus and others should not be forced to sit in prison for years after their release date because the BOP has chosen to ignore the Courts ruling and the Public Defenders Office will do nothing to stop the BOP from continuing to detain people under 4248.

D. Mr. Fiscus' rights under the ex post facto clause have been violated.

1. The Adam Walsh Act was passed in 2006. Mr. Fiscus' convictions all occurred long before the Walsh act was passed. Punishing Mr. Fiscus under the Walsh act for his convictions which all occurred long before the Walsh act was law is an ex post facto violation. Additionally, Mr. Fiscus has never been in Federal custody for any type of child molestation or sexually violent conduct. The BOP Certified Mr. Fiscus based on State convictions. The BOP has no authority

to apply the Walsh act to Mr. Fiscus based on intrastate conduct. Conduct that is criminal which does not violate federal law but violates state law is the responsibility of the state. The BOP lacks the authority to commit Mr. Fiscus based on non-federal criminal conduct. 4248 retroactively increases punishment for crimes that have already been committed. (Warren v Baskerville 233 F.3d 204)

E. Mr. Fiscus' right to be protected against double jeopardy under the 5th amendment has been violated.

1. Commitment under the Walsh act is punitive and thus punishment. Mr. Fiscus has paid his debt to society, he has done his time. To impose additional punishment on Mr. Fiscus after he has fully served his sentence is a clear double jeopardy violation. The BOP is using Mr. Fiscus' prior convictions to justify imposing additional punishment in the form of commitment. Regardless of if it's called civil or criminal a life sentence is a life sentence. Never being free again is clearly punishment. Additionally, Mr. Fiscus was not in BOP custody on a criminal offense. He was there for a probation violation. Nobody should face a life sentence for a probation violation. There also can be no doubt Mr. Fiscus' continued detention is punishment. He is housed in a prison, not a hospital and kept in more restrictive confinement than an inmate serving a criminal sentence. (see Timms v Johns 510 S.H.C. 2160 B.O., ~~Striking~~ Striking down 4248 as criminal punishment)

F. The BOP lacks the authority to apply the Walsh act to ~~being~~ purely state conduct.

1. The BOP is attempting to commit Mr. Fiscus and is holding him under certification based on his past convictions that happened in the state. State convictions have nothing to do with interstate commerce and the federal government has no authority to regulate or punish people for state sex offenses. Mr. Fiscus does not have a qualifying conviction that would qualify him for commitment under 4248, under federal law.

It is the responsibility of the states to commit people who are state sex offenders. The federal government's authority to commit people (if they have any at all) is limited. They may only commit people who are federal sex offenders. Reaching far into the past to find state convictions to qualify someone for 4248 is outside the

Authority of the BOP. The Walsh act is a Federal law to address Federal Sex Offenders. Applying this law to People in Federal Custody For Non sexual offenses based on Past State Conduct is outside the authority of the Federal government. The government lacks the authority to take any kind of action against Mr. Fiscus, including giving him a life Sentence disguised as "Non Punitive" treatment based on State Sex offense Convictions.

Appointment of Counsel:

IN the event this Court finds my motion has merit I request the appointment of Counsel under the Criminal Justice act. I am requesting this because the Federal public defenders Office does not handle Habeas Corpus litigation. Also, I am not able to afford Counsel.

11. Have you previously filed petitions for habeas corpus, motions under 28 U.S.C. § 2255, or any other applications, petitions or motions with respect to this conviction?

☐ yes

☒ no

12. If you answered "yes" to #11, list each petition, motion or application.

(a) The specific nature thereof:

- (1) N/A
- (2) _____
- (3) _____

(b) The name and location of the Court in which each was filed:

- (1) N/A
- (2) _____
- (3) _____

(c) The disposition and date of each such disposition:

- (1) N/A
- (2) _____
- (3) _____

(d) The citations, if known, of any written opinion(s) or order(s) entered pursuant to each such disposition:

- (1) N/A
- (2) _____
- (3) _____

13. If you did not file a motion under 28 U.S.C. § 2255, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention: I am Challenging the fact that I have been illegally detained by the BOP for 29 months past my release date. I Am Not Challenging my Sentence or Conviction. A 2241 is the Correct Motion for this.

14. Has any ground set forth in #9 been previously presented to this court or any other federal court by way of application for habeas corpus, motion under 28 U.S.C. § 2255, or any other petition, motion or application? _____

☒ no

15. If you answered "yes" to #14, identify:

(a) which grounds have been previously presented:

(1) ML.2

(2)

(3)

(b) the proceeding in which each ground was raised:

(1) N/A

(2)

(3)

16. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? ☒ yes ☐ no

(b) your trial, if any? ☐ yes ☐ no

(c) your sentence? ☒ yes ☐ no

(d) your appeal, if any, from the judgment or conviction or the imposition of sentence? ☐ yes ☐ no

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? ☐ yes ☐ no

17. If you answered "yes" to one or more parts of #16, list:

(a) the name and address of each attorney who represented you:

(1) Gary Weight, 290 West Center St, Provo, UT 84603-0200

(2) _____

(3) _____

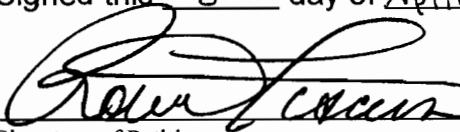
(b) the proceedings at which each attorney represented you:

(1) Revocation hearing and Sentence

(2) _____

(3) _____

Signed this 8 day of April, 2010.


Signature of Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

4/13/10
Date


Signature of Petitioner